

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

GRAHAM GILLETTE,	:	EQCE072582
	:	
Petitioner,	:	
	:	
v.	:	
	:	
	:	RULING ON
TEREE CALDWELL-JOHNSON, CONNIE	:	MOTION TO COMPEL DISCOVERY
BOESEN, CINDY ELSBERND, BILL	:	AFTER IN CAMERA REVIEW
HOWARD, JOE JONGEWAARD, DICK	:	
MURPHY, PAT SWEENEY, All Members of	:	
the Board of the Des Moines Public Schools,	:	
	:	
Respondents.	:	

Pursuant to the court’s April 30, 2013 Ruling on Renewed Motion for *In Camera* Review, the court has conducted an *in camera* review of the recording and meeting minutes for a closed meeting of the Board for the Des Moines Public Schools held on May 10, 2012. Petitioner Graham Gillette (“Gillette”) is represented by attorney Randall Wilson. Respondent members of the Board of the Des Moines Public Schools (collectively, “the Board”) are represented by attorney Andrew Bracken. Having reviewed the recorded discussions and meeting minutes, and being otherwise fully advised in the premises in this matter, the court makes the following ruling.

PERTINENT FACTUAL HISTORY

Much of the factual history of this case was provided in the court’s April 30, 2013 Ruling on Motion for *In Camera* Review. On April 30, 2013, the court granted Gillette’s motion for *in camera* review of the recorded discussions and unredacted meeting minutes of the May 10, 2012 meeting of the Board. The recording and unredacted minutes were delivered under seal on May 8, 2013 and have since been reviewed by the court.

APPLICABLE LAW

Iowa's open meetings law is found in Chapter 21 of the Iowa Code. Iowa Code section 21.3 provides:

Meetings of governmental bodies shall be preceded by public notice as provided in section 21.4 and shall be held in open session unless closed sessions are expressly permitted by law. Except as provided in section 21.5, all actions and discussions at meetings of governmental bodies, whether formal or informal, shall be conducted and executed in open session.

Iowa Code § 21.3 (2011). Chapter 21 also sets for the requirements for public notice:

1. Except as provided in subsection 3, a governmental body shall give notice of the time, date, and place of each meeting including a reconvened meeting of the governmental body, and the tentative agenda of the meeting, in a manner reasonably calculated to apprise the public of that information. Reasonable notice shall include advising the news media who have filed a request for notice with the governmental body and posting the notice on a bulletin board or other prominent place which is easily accessible to the public and clearly designated for that purpose at the principal office of the body holding the meeting, or if no such office exists, at the building in which the meeting is to be held.
2. *a.* Notice conforming with all of the requirements of subsection 1 of this section shall be given at least twenty-four hours prior to the commencement of any meeting of a governmental body unless for good cause such notice is impossible or impractical, in which case as much notice as is reasonably possible shall be given. Each meeting shall be held at a place reasonably accessible to the public, and at a time reasonably convenient to the public, unless for good cause such a place or time is impossible or impractical. Special access to the meeting may be granted to persons with disabilities.

Id. §§ 21.4(1)–(2). There are certain exceptions to the open meeting requirement and closed sessions can be held for discussion of specific matters as set forth in section 21.5:

1. A governmental body may hold a closed session only by affirmative public vote of either two-thirds of the members of the body or all of the members present at the meeting. *A governmental body may hold a closed session only to the extent a closed session is necessary for any of the following reasons:*
....
 - i. To evaluate the professional competency of an individual whose appointment, hiring, performance, or discharge is being considered when necessary to prevent needless and irreparable injury to that individual's reputation and that individual requests a closed session.

2. The vote of each member on the question of holding the closed session and the reason for holding the closed session by reference to a specific exemption under this section shall be announced publicly at the open session and entered in the minutes. *A governmental body shall not discuss any business during a closed session which does not directly relate to the specific reason announced as justification for the closed session.*

3. Final action by any governmental body on any matter shall be taken in an open session unless some other provision of the Code expressly permits such actions to be taken in closed session.

4. A governmental body shall keep detailed minutes of all discussion, persons present, and action occurring at a closed session, and shall also audio record all of the closed session. The detailed minutes and audio recording of a closed session shall be sealed and shall not be public records open to public inspection. *However, upon order of the court in an action to enforce this chapter, the detailed minutes and audio recording shall be unsealed and examined by the court in camera. The court shall then determine what part, if any, of the minutes should be disclosed to the party seeking enforcement of this chapter for use in that enforcement proceeding. In determining whether any portion of the minutes or recording shall be disclosed to such a party for this purpose, the court shall weigh the prejudicial effects to the public interest of the disclosure of any portion of the minutes or recording in question, against its probative value as evidence in an enforcement proceeding.* After such a determination, the court may permit inspection and use of all or portions of the detailed minutes and audio recording by the party seeking enforcement of this chapter. A governmental body shall keep the detailed minutes and audio recording of any closed session for a period of at least one year from the date of that meeting, except as otherwise required by law.

Id. § 21.5 (emphasis added). The present action is brought pursuant to the enforcement section of Chapter 21.

Once a party seeking judicial enforcement of this chapter demonstrates to the court that the body in question is subject to the requirements of this chapter and has held a closed session, the burden of going forward shall be on the body and its members to demonstrate compliance with the requirements of this chapter.

Id. § 21.6(2).

Meetings are properly closed under Iowa Code section 21.5(1)(i) when “it [is] clear that the exposure of the allegations against [an individual] to the public would cause needless and irreparable injury to [the individual]’s reputation within the community, particularly [when] there

is no evidence that such allegations had anything to do with [the individual's] job performance.” *Feller v. Scott Cnty. Civil Serv. Com’n*, 482 N.W.2d 154, 158 (Iowa 1992). Governmental bodies abuse their discretion if they refuse to close meetings where information such as this will be discussed and the individual requests the meeting be closed. *Id.* at 160.

A court may review *in camera* the tapes and transcripts of closed meetings to determine whether a governmental body strayed from the announced reason for closing the meeting. See *Tausz v. Clarion-Goldfield Comm. Sch. Dist.*, 569 N.W.2d 125, 127 (Iowa 1997); *Feller*, 482 N.W.2d at 158; *Fettkether v. City of Readlyn*, 595 N.W.2d 807, 815 (Iowa Ct. App. 1999). The balancing of interests between those who assert the transcripts should be made public, and those who assert the transcripts should remain closed, is to be made on a case-by-case basis to ensure governmental bodies do not use Iowa Code chapter 21 to close meetings which should otherwise be open to the public. *Tausz*, 569 N.W.2d at 128.

After balancing the interests during review *in camera*, a court may accommodate an identified “need for relevant evidence by a party engaged in litigation with the public agency and seeking discovery under [the] Iowa Rule[s] of Civil Procedure . . . by court-ordered disclosure to that party of relevant portions of the otherwise confidential record.” *Id.* at 127. The closure of meetings by a public agency “must be carefully circumscribed so as to prevent an abuse of utilizing closed sessions when public sessions are required by statute.” *Id.* at 128. Courts make these determinations “on a case-by-case basis.” *Id.* Upon review, if a court determines that information and discussions improperly held in closed session is “sufficiently intertwined” with those discussions properly held in closed session such that “release of the redacted transcript would be difficult” without disclosing protected information, the court may deny discovery of the tapes. *Id.* at 129.

During *in camera* review, a court should be mindful that the Iowa Supreme Court has previously “reject[ed] the contention . . . that the discussion of administrative needs for the coming year would be so inextricably linked with the proposed evaluation of [a] superintendent in closed session that this topic did not need to be shown on the agenda or discussed in the public portion of [a] meeting.” *Barrett v. Lode*, 603 N.W.2d 766, 770 (Iowa 1999). The Iowa Supreme Court viewed this as “a deliberate decision to discuss an additional topic without showing it on the agenda,” and “not a random reference to a prospective administrative issue as part of evaluating the superintendent’s past performance in closed session.” *Id.* The Court also notes that “even if the discussion of additional matter was not contemplated when the agenda was prepared, that discussion would be a violation of the [notice provision of the] act unless found to be an emergency item.” *Id.* at 171 (citing *KCOB/KLVN, Inc. v. Jasper Cnty. Bd. of Sup’rs*, 473 N.W.2d 171, 174 (Iowa 1991)).

ANALYSIS

With these principles in mind, the court looks to the recording and unredacted minutes of the closed meeting of the Board held May 10, 2012, to determine if any discussions were improperly held in closed session. The minutes span fifteen (unnumbered) pages and transcribe the conversations held over the approximately one hour and twenty minute long meeting. The court notes that the minutes are not a word for word transcription but a very detailed description of the discussion. The closed parts of the meeting minutes begin on page one, and end on page fourteen.

The Board announced on page one that the closed session was “pursuant to Iowa Code section 21.5(1)(i).” Therefore, the Board was required to only discuss that business which “directly relate[d] to” the “evaluat[ion] [of] the professional competency of an individual whose

appointment, hiring, performance, or discharge is being considered when necessary to prevent needless and irreparable injury to that individual's reputation and that individual requests a closed session.” Iowa Code §§ 21.5(1)(i), (2). The court finds that the majority of the May 10, 2012 closed session directly related to the stated reason for the closed session under Iowa Code section 21.5(1)(i). However, there are several points in the meeting when other matters not directly related to the stated reason for the closed session were briefly discussed. There are instances where a statement or comment is made which is not directly related to the stated reason for the closed session but is so intertwined with the discussion which is directly related that it is impossible to separate it out without disclosing statutorily protected information. The remainder of this ruling will go through the minutes of the meeting to indicate what discussions were properly conducted in closed session.

The court finds that the Board discussion in closed session starting on page one, continuing to page six, and ending with the statements directly before the paragraph which begins “Mr. Murphy commended the work . . .” is directly related to the stated purpose for the closed session under Iowa Code section 21.5(1)(i) and shall not be disclosed.

The court finds the Board discussion starting on page six with the paragraph which begins “Mr. Murphy commended the work . . .”, continuing onto page seven, and ending with the paragraph which begins “Mr. Jongewaard asked when . . .” is not directly related to the stated purpose for the closed session and this discussion is ordered to be disclosed.

The court finds that the Board discussion starting on page seven which directly follows the paragraph which begins “Mr. Jongewaard asked when . . .”, continuing to page nine, and ending with the statements directly before the paragraph which begins “Ms. Caldwell-Johnson

stated because of the importance. . .” is directly related to the stated purpose for the closed session under Iowa Code section 21.5(1)(i) and shall not be disclosed.

The court finds the Board discussion starting on page nine with the paragraph which begins “Ms. Caldwell-Johnson stated because of the importance. . .”, continuing onto page ten, and ending with third bullet-point paragraph which begins “If an individual Board member . . .” is not directly related to the stated purpose for the closed session and this discussion is ordered to be disclosed.

The court finds the Board discussion starting on page ten which directly follows the third bullet-point, and continuing to the mid-paragraph sentence which begins “The Board has a lot of heavy lifting . . .” is directly related to the stated purpose for the closed session under Iowa Code section 21.5(1)(i) and shall not be disclosed.

The court finds the Board discussion starting at the bottom of page ten with the sentence “The Board has a lot of heavy lifting to do.” continuing onto page eleven, and ending half way down page eleven with the sentence which begins “The Board needs to be able to talk . . .” is not directly related to the stated purpose for the closed session and this discussion is ordered to be disclosed.

The court finds the Board discussion on page eleven starting with the next sentence, and continuing onto page twelve, and ending directly before the sentence which begins “Mr. Howard talked about a response to any media . . .,” is directly related to the stated purpose for the closed session under Iowa Code section 21.5(1)(i) and shall not be disclosed.

The court finds the Board discussion on page twelve starting with the sentence which begins “Mr. Howard talked about a response to any media . . .”, continuing through page thirteen

and onto page fourteen, and ending with the sentence “Mr. Roeder commented the Cabinet is on standby for a meeting this afternoon.” is not directly related to the stated purpose for the closed session and this discussion is ordered to be disclosed.

The court finds that the remaining Board discussion on page fourteen held before the Board moved into open session is directly related to the stated purpose for the closed session under Iowa Code section 21.5(1)(i) and shall not be disclosed.

The request for this *in camera* review is before the court as a matter of discovery in this action. Therefore, the disclosures hereunder ordered by the court are “to the party seeking enforcement of this chapter” for use in this enforcement proceeding. The disclosures are not to the public in general at this time, but only to the petitioner. Re-dissemination of the disclosures will be strictly prohibited without further order of the court.

Appended to the Board’s copy of this order is a sealed copy of the minutes on which the court indicates by highlighting those portions of the minutes and the corresponding portion of the recording which shall be disclosed to the petitioner. The Board is directed to provide an appropriately redacted copy of the minutes and recording to the petitioner in accordance with this ruling within ten days of the date of this ruling.

ORDER

IT IS ORDERED that the motion to compel discovery is GRANTED IN PART as specifically set forth above and only for those parts of the meeting minutes which are not directly related to the stated purpose for holding a closed meeting of the Board on May 10, 2012.

IT IS ORDERED that the Board shall provide to the petitioner, as the party seeking enforcement of Chapter 21 of the Iowa Code, those parts of the meeting minutes and recording

not directly related to the stated purpose for holding a closed meeting as set forth above, and as noted on the sealed copy of the minutes provided to the Board with this order, within ten days of the date of this order.

IT IS ORDERED that the above disclosure is only to the party seeking enforcement, and is not a public disclosure. The parties are prohibited from any re-dissemination of the ordered disclosure without further authorization and order of this court.

IT IS ORDERED that the unredacted minutes and recording provided to the court for its *in camera* review will be filed with the Clerk of Court under seal for purposes of the record.



KAREN A. ROMANO, DISTRICT JUDGE
FIFTH JUDICIAL DISTRICT OF IOWA

Copies to:
Randall C. Wilson
ACLU of Iowa Foundation
901 Insurance Exchange Bldg.
550 Fifth Avenue
Des Moines, IA 50309
Randall.Wilson@aclu-ia.org

Andrew J. Bracken
AHLERS & COONEY, P.C.
100 Court Avenue
Suite 600
Des Moines, IA 50309
Fax: (515) 243-2149
dbracken@ahlerslaw.com